

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADAM PATRICK ADAMS,

Defendant-Appellant.

UNPUBLISHED

July 12, 2011

No. 286641

Wayne Circuit Court

LC No. 06-011793-FC

Before: MURRAY, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by leave granted¹ his bench trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84,² and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a second habitual offender, MCL 769.10, to 6 to 15 years' imprisonment for the assault with intent to do great bodily harm less than murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the prosecution failed to present sufficient evidence to support his conviction of assault with intent to do great bodily harm less than murder. We review the record de novo to determine whether the evidence presented at trial, when viewed in the light most favorable to the prosecution, was sufficient to justify a rational trier of fact finding defendant guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

¹ Defendant initially filed an application for delayed appeal in this Court on July 18, 2008, which was denied on November 21, 2008. *People v Adams*, unpublished order of the Court of Appeals, entered November 21, 2008 (Docket No. 286641). Defendant then appealed to the Michigan Supreme Court, which remanded the matter to this Court for consideration as on leave granted. *People v Adams*, 483 Mich 1022 (2009).

² Defendant's original charge was for assault with intent to commit murder, MCL 750.83; he was convicted of only the lesser-included offense.

The constitutional right to due process prohibits criminal convictions absent proof of each and every element of the crime charged beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 316; 99 S Ct 2781; 61 L Ed 2d 560 (1979). Defendant's only challenge to the sufficiency of the evidence is that the prosecution failed to prove beyond a reasonable doubt that defendant perpetrated the crime. Identity of the defendant as the person who committed the alleged offense is an essential element in every criminal prosecution. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008).³ "Identity may be shown by either direct testimony or circumstantial evidence which gives the [trier of fact] an abiding conviction to a moral certainty that the accused was the perpetrator of the offense." *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Further, reasonable inferences arising from circumstantial evidence can provide sufficient proof for conviction. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Here, police officers testified that they saw defendant walking along Seven Mile in the vicinity of the shooting holding an AK-47. Defendant walked behind a tree momentarily and emerged from behind the tree without the gun. Police officers then recovered the AK-47 from behind the tree and detained defendant. Further, Vinson testified that he saw a man carrying an AK-47 walking near the gas station where people in the vicinity had fled for safety. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could conclude beyond a reasonable doubt that defendant perpetrated the crime, and the trial court's determination to that effect should stand. The fact that it was necessary to draw reasonable inferences from the evidence to reach this conclusion, rather than rely on direct evidence alone, does not render the trial court's decision erroneous. *Id.* at 428.⁴

Defendant next argues that he is entitled to resentencing because the trial court erred in scoring OV 4 at ten points. Factual findings at sentencing are reviewed for clear error, and the trial court's decision to score an offense variable is reviewed for an abuse of discretion. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), *aff'd* 473 Mich 399 (2005). The ultimate question for this Court is whether the trial court properly exercised its discretion and whether the evidence on the record adequately supports the particular score given. *Id.*

The pertinent statute, MCL 777.34, provides:

³ Although defendant only contests the evidence relative to his identity as the perpetrator of this crime, we note that "[t]he elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or offer with force or violence to do corporal hurt to another, (2) coupled with an intent to do great bodily harm less than murder." *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997), *mod in part on other grounds* 457 Mich 885 (1998).

⁴ Thus, whether there were discrepancies or deficiencies in the testimony of the complainant regarding what Edward Brown said is irrelevant, as the officers' testimony alone, in conjunction with other evidence of the crime being committed with an AK-47, was enough to identify defendant as the perpetrator.

(1) Offense variable 4 is psychological injury to a victim. Score offense variable 4 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

- (a) Serious psychological injury requiring professional treatment occurred to a victim . . . 10 points
- (b) No serious psychological injury requiring professional treatment occurred to a victim . . . 0 points

(2) Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

This Court will uphold a scoring decision when it is supported by any evidence in the record. *People v. Endres*, 269 Mich App 414, 417; 711 NW2d 396 (2006). Consistent with the statute, we have found no error in the scoring of OV 4 simply because the complainant has not yet sought professional treatment. *People v Drohan*, 264 Mich App 77, 90; 689 NW2d 750 (2004), *aff'd* 475 Mich 140 (2006). Further, this Court has even found testimony that defendant's behavior caused the complainant fear sufficient to support the decision to score OV 4 at ten points. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

The record contains evidence supporting the scoring of OV 4. Specifically, the presentence investigation report⁵ states that residents of an elderly nursing home that was hit by several bullets fired by defendant received counseling because they were "shaken up." Additionally, some of the residents whose rooms were located on the side of the building where the shooting took place requested their rooms be moved out of fear of another incident. Defendant's argument as to the scoring of OV 4 is without merit. Consequently, so is his argument regarding ineffective assistance of counsel that was premised on the failure to challenge the scoring of OV 4. *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008).

Defendant has also filed a Standard 4 brief, see Michigan Supreme Court Administrative Order 2004-06, Standard 4, in which he raises one additional issue. Defendant argues that his trial counsel's failure to impeach Officer Eric Smith's testimony denied him his constitutional right to the effective assistance of counsel. He contends that the officer's police report contradicted the officer's trial testimony and the report should have been used to discredit his trial testimony.

Defendant failed to properly preserve a claim of ineffective assistance of counsel; therefore, review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). A trial counsel's decisions concerning "what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy," which will not be second-guessed on appeal. *Horn*, 279 Mich App at 39.

⁵ *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993) (a court may utilize statements within presentence investigation report as evidence for scoring).

We hold defendant failed to demonstrate that trial counsel's performance fell below an objective standard of reasonableness, and defendant failed to overcome the strong presumption that trial counsel's strategy was sound. That is, we are not persuaded that trial counsel's failure to attempt to impeach Officer Smith with the police report was unsound trial strategy. Contrary to defendant's assertion, during cross-examination, trial counsel attempted to elicit discrepancies and arguable bases for regarding Officer Smith's testimony as incredible. Trial counsel engaged in an extensive cross-examination of the officer calling into question his perceptions and memory of the events. Trial counsel highlighted the long distance from which Officer Smith initially viewed the alleged gunman, and elicited testimony that it was dark and the area was dimly lit. Trial counsel also elicited testimony from Officer Smith that he did not observe defendant's face. We note that trial counsel extensively questioned Officer Smith on his observations that night, and trial counsel attempted to discredit Officer Smith's testimony by attacking his memory and perception. We cannot conclude that the failure to discredit the officer's testimony with the police report means that trial counsel's assistance was constitutionally deficient.

Further, defendant has not overcome the presumption that trial counsel's decision not to utilize the police report to discredit the officer's testimony was a matter of sound trial strategy because there was no actual discrepancy. The report indicates that the officer observed defendant "on foot turn [southbound] onto Fenelon from [eastbound] on E. 7 Mile." That is, the report notes that defendant was walking eastbound on Seven Mile and that he then turned onto Fenelon walking southbound. At trial, the officer testified that he observed defendant walking eastbound on Seven Mile and then walked southeast across Fenelon. This testimony is wholly consistent with the police report indicating that defendant walked eastbound on Seven Mile and turned southbound onto Fenelon. Accordingly, trial counsel's failure to use the police report to discredit Officer Smith's testimony was not unsound trial strategy because there was no discrepancy to reveal.

We also hold that even if trial counsel could have impeached the officer's trial testimony with the police report, there was no reasonable probability that the result would have been different. In both the police report and at trial, Officer Smith noted that he observed defendant in the area of Fenelon and Seven Mile holding an AK-47. The report and the officer's testimony placed defendant within the vicinity of the crime with a gun in hand. Accordingly, defendant has failed to show that trial counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it was reasonably probable that, but for trial counsel's ineffective assistance, the result of the proceeding would have been different.

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause